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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHN SANDOVAL, Plaintiff and Appellant, v. LOS ANGELES COUNTY DPSS et al., Defendant and Respondent.	B200213 (Los Angeles County Super. Ct. No. BC345719)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Affirmed.

Akudinobi & Ikonte, Emmanuel C. Akudinobi and Chijioke O. Ikonte, for Plaintiff and Appellant.

Gutierrez, Preciado & House, LLP, Calvin House and Ann D. Wu, for Defendant and Respondent.

In the underlying action, the trial court granted nonsuit on appellant John Sandoval's claim for violation of due process against respondent Los Angeles County Department of Public Social Services (DPSS). Following a jury verdict in favor of DPSS on Sandoval's remaining claims against DPSS for civil rights violations and wrongful termination, the trial court entered judgment for DPSS and denied Sandoval's motion for a new trial. We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. *Complaint*

Sandoval initiated the underlying action in January 2006. His complaint asserted claims against DPSS for retaliation (Gov. Code, § 12940, subd. (h); 42 U.S.C. § 1983), denial of due process (42 U.S.C. § 1983), disability discrimination (Gov. Code, § 12940, subd. (m)), wrongful termination in violation of public policy, and intentional infliction of emotional distress.[1] The complaint alleged the following facts: DPSS hired Sandoval in 1991. After he complained in 1997 that a supervisor had sexually harassed a co-worker, he was subjected to retaliation in the form of poor performance evaluations, reassignments, and false accusations of misconduct. In February 2001, DPSS improperly sought to reassign him, and he took a medical absence. While Sandoval was absent from work, DPSS discharged him. In January 2003, the Civil Service Commission ruled that Sandoval be restored to his position, provided that he was fit to return to work, and that he

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[1] The complaint also asserted a claim for conspiracy to interfere with civil rights against several DPSS employees (42 U.S.C. § 1985(3)). This claim was dismissed prior to trial.

established that he had properly claimed worker's compensation benefits. When Sandoval reported for work in June 2004, DPSS declined to reinstate him.

DPSS sought summary judgment or adjudication on the complaint, contending, inter alia, that Sandoval's claims failed because he had "automatically resigned" in October 2003 by failing to respond to three notices DPSS sent him in 2003, requesting him to appear for work. DPSS pointed to section 5.12.020 of the Los Angeles County Code, which provides that a County employee who "fails to discharge his regularly assigned duties" for specified periods is "deemed to have resigned . . . ." The trial court granted summary adjudication on Sandoval's claims for disability discrimination and infliction of emotional distress, and otherwise denied DPSS's motion.

B. *Evidence at Trial*

Trial by jury on Sandoval's remaining claims began on March 5, 2007.[2] Sandoval testified as follows: DPSS hired him in 1991 as an eligibility worker, charged with processing applications for welfare benefits. He worked hard, received commendations for his performance, and was eventually elected a union shop steward. In late 1997, he saw Roberto Del Valle, a supervisor, sexually harass a co-worker, and complained to the manager of the DPSS human resources department, who encouraged Sandoval "to change [his] testimony." Sandoval nonetheless pursued the complaint about Del Valle, who was ultimately discharged.

In 1998, Priscilla Stallworth became the deputy district director responsible for Sandoval's section. Vicky Short, Sandoval's immediate supervisor, reported

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[2] Prior to trial, Sandoval filed a first amended complaint that modified his claims in ways not material here.

directly to Stallworth. When Stallworth reassigned Sandoval to a position he regarded as a demotion, he filed a grievance, and was not reassigned. Short told him she had been advised not to pick Sandoval as her "lead worker," and he also received a low score of 70 on an examination that determined his prospects for promotion. He appealed the score, which was readjusted to a score of 100.

According to Sandoval, he had no disciplinary record prior to July 2000, when Stallworth improperly charged him with delay in the processing of a file. In early February 2001, she improperly charged him with an unauthorized absence from his desk. He filed grievances regarding these charges, and suffered no discipline. On February 22, 2001, Stallworth notified him that he had been reassigned to a new unit. Sandoval filed a grievance regarding the reassignment, went on leave, and sought worker's compensation benefits, citing work-related emotional distress and physical pain he had experienced for several months.

While Sandoval was on leave, a co-worker asked him to help her obtain an item of salary. When he met the co-worker in the lobby of a DPSS building, he encountered Esther Martinez, a supervisor, who said he was not supposed to be there, and later falsely charged him with discourtesy. As a result, he received a seven-day suspension. In January 2002, DPSS discharged Sandoval on the ground that he had improperly asked a participant in a welfare benefits program to complete paperwork at a location outside DPSS offices. Sandoval appealed the discharge. In November 2002, a hearing officer of the Civil Service Commission (Commission) filed a report recommending, inter alia, that Sandoval be accorded "conditional reinstatement . . . predicated upon [(1)] [his] prevailing in his Worker's Compensation appeals case, and [(2)] his being declared fit to return to work." On January 22, 2003, the Commission adopted the hearing officer's

recommendation "to not sustain [DPSS] in the discharge and to make [Sandoval] whole."

While Sandoval was on leave, he lived with his parents on Randolph Avenue in Los Angeles (the Randolph address) until late 2001, on Copeland Street in Lynwood (the Copeland address) until late 2003, and thereafter on Occidental Boulevard in Los Angeles (the Occidental address). Sandoval acknowledged that DPSS employees were obliged to notify DPPS about changes in their address, but testified that this obligation attached only when they "were at work." According to Sandoval, he asked the attorney representing him in his action for worker's compensation benefits to notify DPSS of the changes in his address. He could not recall whether he personally contacted DPSS about the changes. Sandoval also acknowledged that he used his parents' Randolph address in connection with his claim for worker's compensation benefits, that checks for these benefits were sent to the Randolph address through June 21, 2004, and that after 2001 he continued to pick up his mail at that address.

In June 2004, Sandoval's claims for worker's compensation benefits were resolved in his favor. On June 23, 2004, he reported for work at DPSS, and was told he had been fired. He later learned that the termination rested on his failure to report for work in compliance with three notices (dated June 3, 2003, July 1, 2003, and October 2, 2003), which had been sent to his parents' Randolph address. According to Sandoval, he never received the notices, even though he picked up mail at the Randolph address. In May 2005, Sandoval sought reinstatement by filing a petition for writ of mandate in the superior court, but his petition was dismissed for lack of prosecution.

At trial, Sandoval called Stallworth as a witness, who testified as follows: While she supervised Sandoval, she was unaware that he had complained about an

incident of sexual harassment. As soon as she assumed responsibility for Sandoval's section, she heard complaints from clients about mistakes in his processing of their cases, and decided to transfer him to a position in which he was likely to make fewer errors. Sandoval appealed the reassignment to Stallworth's superior, who told her that Sandoval did not have to move. She charged Sandoval with insubordination in 2000, when she set a deadline for Sandoval to correct an error in one of his cases, and he failed to make a timely correction. She also charged him with unauthorized absences. Stallworth again tried to reassign Sandoval in 2001.[3]

In addition, Sandoval called Wendy Benson-Higgins. According to Benson-Higgins, she had been a manager in the DPSS Department of Investigative Services since 1998. As such, she participated in the investigation of Sandoval's grievance regarding his examination score in 1998, and otherwise reviewed and signed paperwork arising out of other investigations regarding Sandoval. She could not recall the events surrounding the 1998 grievance, and had little direct involvement with Sandoval's other grievances and his January 2002 discharge.

Benson-Higgins testified that after the Commission's January 2003 decision, DPSS sent three notices in 2003 to Sandoval at the Randolph address, asking him to return to work. DPSS mailed the notices upon receiving information that the Commission's criteria for restoring Sandoval to his position had been satisfied: DPSS learned that Sandoval's worker's compensation claim had been effectively resolved, and that his doctors had released him. Each notice consisted of two

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[3] Stallworth acknowledged that under the then-applicable memorandum of understanding between DPSS and Sandoval's union, union stewards could be transferred over their objection only if no other employee met the qualifications for the vacant position. According to Stallworth, she complied with this requirement.

identical letters, one sent by certified mail and the other by first class mail. The certified copy of each notice was returned as unclaimed.

The first notice, dated June 3, 2003, informed Sandoval that DPSS had rescinded his January 2002 discharge, and asked him to report for work on June 10, 2003.[4] The second notice, dated July 1, 2003, noted Sandoval's failure to respond to the first notice, reaffirmed DPSS's decision to rescind his January 2002 discharge, and asked him to report for work. The second notice added: "If you fail to provide [DPSS] with a valid reason as to why you cannot report to work, further administrative action may be taken." The third notice, dated October 2, 2003, asserted that Sandoval, although twice directed to report for work, had "failed to do so without giving an explanation, and without any authorization." It further stated: "This letter is to inform you that if you do not report to work on or before October 7, 2003, [DPSS] will deem you to have resigned from your position . . . under Los Angeles County Codes 5.12.02[0] and 5.12.030 because of your unauthorized absence for more than three consecutive working days and failure to discharge your regularly assigned duties." The second and third notices state on their face that copies were also sent to the attorney who had represented Sandoval before the Commission.

Benson-Higgins acknowledged that she received a copy of the Commission's ruling regarding Sandoval's discharge on or after January 29, 2003, and that the certificate of mailing attached to the ruling listed the Copeland address for Sandoval. According to Benson-Higgins, DPSS policies required written

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4 DFSS submitted the three notices into evidence.

notices to employees, and the Randolph address constituted Sandoval's "address on record" because it was the only address he had provided to DPSS.[5]

DPSS's principal witnesses were Patricia Barnard and Jacqueline Mallard, who testified regarding the procedures DPSS employs in sending certified letters. Mallard stated that her signature was on the certification form accompanying the October 2003 notice. She recalled that she took the notice to the post office and mailed it, but could not remember whether in mailing it she placed it in a mail bin or a mailbox.

C. *Judgment and New Trial Motion*

Following the presentation of evidence at trial, the trial court granted DPSS's motion for nonsuit on Sandoval's due process claim. After the jury returned a special verdict that Sandoval was lawfully deemed to have resigned from his position in October 2003, the trial court entered judgment in DPSS's favor on Sandoval's remaining claims, and denied his motion for a new trial. This appeal followed.

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[5] Sandoval presented several other witnesses. Ramona Almquist testified that in August 1998, she sent a letter to Roberto Del Valle informing him that he had been discharged. Vicky Short testified that while she supervised Sandoval, she had no disciplinary problems with him, and was satisfied with his work. When she asked Sandoval to become her lead worker, he agreed, but Stallworth advised her not to make him lead worker because Stallworth "needed someone [she] could work with." Esther Martinez testified that Sandoval refused to be reassigned in January 2001, even though his unit was being disbanded. She acknowledged that she encountered him in the lobby of a DPSS building in June 2001, and signed a letter to Sandoval in November 2001 stating DPSS's intent to discharge him. Joseph Ochoa testified that Sandoval had lived with him at the Occidental address since November 2003. Marco Tule testified that in June 2004, he accompanied Sandoval to a DPSS office, where Sandoval was told that he had been discharged. Cecilia Cisneros testified that when Sandoval came to her office in 2004, she told him that he had been discharged.

DISCUSSION

Sandoval contends (1) that nonsuit was improper on his due process claim, (2) that the jury was misinstructed, (3) that the verdict form was defective, (4) that there was juror misconduct, and (5) that the trial court improperly declined to answer questions from the jury. These are the same contentions on which he based his motion for a new trial, which he asserts the trial court improperly denied.[6] As explained below, he has failed to show reversible error.

A. *Resignation*

Sandoval's challenges to the jury instructions, special verdict form, and grant of nonsuit are closely tied to the provisions of the Los Angeles County Code governing employee resignation (§ 5.12.020 et seq.)[7] Section 5.12.020, subdivision (A), provides that a County employee who "without prior authorization is absent or fails to discharge his regularly assigned duties for either three

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[6] We therefore examine the contentions in light of the appropriate standard of review on appeal, and -- when necessary -- under the standard of review applicable to the denial of a new trial motion. Generally, the trial court's ruling on a new trial motion is reviewed for an abuse of discretion. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) To the extent that the trial court confronted conflicting declarations in denying the new trial motion, we affirm the trial court's factual determinations, whether express or implied, if supported by substantial evidence. (*Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 507-508 & fn. 3; *DeWit v. Glazier* (1957) 149 Cal.App.2d 75, 82.) Nonetheless, "it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party . . . including an order denying a new trial. In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial." (*City of Los Angeles v. Decker*, *supra*, 18 Cal.3d at pp. 871-872.)

[7] All further references are to the Los Angeles County Code, unless otherwise indicated.

consecutive regular working days or for two consecutive regularly scheduled on-duty shifts, whichever may be applicable, shall be deemed to have resigned effective as of the end of the day of [*sic*] which he last performed any of the duties of his position; provided, however, an officer or employee shall not be deemed to have so resigned if he resumes the performance of his regularly assigned duties at the commencement of his next regular working day or on-duty shift following the expiration of the aforementioned period of absence or failure to discharge duties."

Section 5.12.030, which is central to Sandoval's contentions, directs the County employer to provide an absent employee with a notice that his or her continued absence shall constitute a resignation, but provides that the employer's failure to give the notice does not, by itself, nullify the employee's resignation. Section 5.12.030 states: "When a county officer or employee, without prior authorization, is absent or fails to discharge his regularly assigned duties for such period of time that it appears likely he intends to resign pursuant to subsection A of Section 5.12.020, the appointing officer of such affected officer or employee shall serv[e] upon that officer or employee, either personally, by telegraph, or by first class mail addressed to the most recent address furnished to the appointed officer by the affected officer or employee, a notice in writing stating that failure of the officer or employee to resume the discharge of his duties on or before the commencement of the working day stated therein shall constitute such resignation. Said notice shall be posted, delivered personally, or delivered to the telegraph office at least 24 hours prior to the commencement of the working day specified in

the notice. Failure to give such written notice shall not cause such resignation to be ineffective."[8]

1. *Nonsuit*

Sandoval contends that nonsuit was improper on his due process claim under 42 United States Code section 1983 (section 1983).[9] The crux of his claim -- often called a "*Monell*" claim -- was that DPSS, a department of Los Angeles County (the County), denied Sandoval due process in declining to reinstate him pursuant to the January 2003 Civil Service Commission decision when he reported for work in June 2004.[10]

Under section 1983, the County cannot be held liable for Sandoval's injuries in the absence of a "policy[,] official decision, or custom." (*Ogborn v. City of Lancaster* (2002) 101 Cal.App.4th 448, 463.) As our Supreme Court has explained, under section 1983, counties "cannot be held vicariously liable under

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8 The resignation provisions in the Los Angeles County Code accord an employee subject to this form of resignation opportunities to challenge the resignation. The employee may file a written request for reinstatement within 20 days of the effective date of the resignation, and seek reinstatement on the grounds of "good cause for the absence or failure to perform duties, such as bona fide illness, injury, or similar circumstances beyond the control of the officer or employee." (§ 5.12.020, subd. (A).) In addition, the provisions state that "[n]othing . . . precludes any . . . employee from filing with the civil service commission, pursuant to its rules, a request for a hearing on the ground that his resignation . . . was obtained by the fraud, duress, or undue influence of the county." (§ 5.12.040.)

9 Section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

section 1983 for their subordinate officers' unlawful acts, [but] may be held directly liable for constitutional violations carried out under their own regulations, policies, customs, or usages by persons having 'final policymaking authority' over the actions at issue." (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 829.) Although the trial court granted nonsuit without explaining its ruling, in denying Sandoval's new trial motion the court stated that nonsuit was proper because Sandoval had "failed to present any evidence of an unconstitutional governmental custom or policy."[11] (Italics omitted.)

a. *Custom or Policy*

Sandoval's principal contention is that section 5.12.030 is constitutionally infirm, and thus constitutes the requisite custom or policy. He argues that the final sentence of section 5.12.030 contravenes the due process rights of public employees to notice of a resignation through absence from work. For the reasons explained below, we disagree.

Under the United States Constitution, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is

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10 Claims of this kind against municipalities originate with *Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658.

11 "'A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor.' [Citation.] In determining the sufficiency of the evidence, the trial court must not weigh the evidence or consider the credibility of the witnesses. Instead, it must interpret all of the evidence most favorably to the plaintiff's case and most strongly against the defendant, and must resolve all presumptions, inferences, conflicts, and doubts in favor of the plaintiff. If the plaintiff's claim is not supported by substantial evidence, then the defendant is entitled to a judgment as a matter of law, justifying the nonsuit. [Citation.]" (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541, quoting *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) We review rulings on motions for nonsuit de novo, applying the same standard that governs the trial court. (*Saunders v. Taylor, supra*, at pp. 1541-1542 & fn. 2.)

notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations.] The notice must be of such nature as reasonably to convey the required information [citation], and it must afford a reasonable time for those interested to make their appearance [citations]. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied." (*Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314-315.)

In *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1108 (*Coleman*), our Supreme Court discussed the procedural protections that due process accords a public employee facing a discharge under Government Code section 19996.2, subdivision (a), which states that an employee's unauthorized five-day absence from work is an "'automatic resignation.'"[12] Although the statute defines the absence as an "automatic resignation," the court reasoned that no absence becomes an actual resignation until "the state decides to invoke the statute." (*Coleman, supra*, 52 Cal.3d at p. 1117.) The court stated:

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12 Subdivision (a) of Government Code section 19996.2 provides: "Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked. [¶] A permanent or probationary employee may, within 90 days of the effective date of such separation, file a written request with the department for reinstatement; provided, that if the appointing power has notified the employee of his or her automatic resignation, any request for reinstatement must be made in writing and filed within 15 days of the service of notice of separation. Service of notice shall be made as provided in Section 18575 and is complete on mailing. Reinstatement may be granted only if the employee makes a satisfactory explanation to the department as to the cause of his or her absence and his or her failure to obtain leave therefor, and the department finds that he or she is ready, able, and willing to resume the discharge of the duties of his or her position or, if not, that he or she has obtained the consent of his or her appointing power to a leave

"[B]efore [the state] can invoke the [] statute, the state must make factual determinations; whether the employee has resigned under the [] statute turns on the presence of the factual prerequisites for statutory resignation, namely, an absence that is for five consecutive working days and is without leave." (*Id*. at p. 1118.) The court thus distinguished between the factual basis for an automatic resignation, and the state's decision to assert that the requisite factual basis existed for an automatic resignation. (*Id.* at pp. 1118-1123.)

The court concluded: "[B]efore the state can treat [an] . . . employee's unexcused absence . . . as a constructive resignation under the [] statute, it must give the employee written notice of the action contemplated. The notice must advise the employee of the facts supporting the state's invocation of the [] statute. If the employee challenges the accuracy of the state's factual basis, the state must, as soon as practicable, give the employee an opportunity to present his or her version of the facts. To assure 'the appearance and reality of fairness' in the decisionmaking process [citation] and to protect against a potential misuse of the [] statute, such an informal hearing must be before a neutral fact finder. Once the state has provided notice and an opportunity to respond, neither the federal nor the state Constitution requires anything more." (*Coleman*, *supra*, 52 Cal.3d at pp. 1122-1123.)

In so concluding, the court rejected the contention that Government Code section 19996.2, subdivision (a), is constitutionally infirm because it does not expressly accord these protections to employees. (*Coleman*, *supra*, 52 Cal.3d at p. 1123.) The court stated: "When, as here, the 'constitutional weakness' lies primarily in 'what the statute[] [has] omitted, not [in its] express terms,' the statute

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of absence to commence upon reinstatement. [¶] An employee so reinstated shall not be paid salary for the period of his or her absence or separation or for any portion thereof."

may properly be invoked so long as due process requirements are met." (*Ibid*., quoting *Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 403.)

Sandoval argues that the final sentence of section 5.12.030 "says in essence that there is no need to comply with the notification requirement" of procedural due process before the employee is terminated. In our view, this contention is mistaken. In interpreting section 5.12.030, we look to the language of the provision, with an eye to harmonizing it with surrounding provisions and the state and federal Constitutions. (*Abramson v. City of West Hollywood* (1992) 7 Cal.App.4th 1121, 1126.)

We begin by examining subdivision (A) of section 5.12.020 (subdivision (A)), to which section 51.12.030 refers. Subdivision (A) provides that an employee who is absent for a three-day period and fails to return to work on the day following this period, "shall be deemed to have resigned." Although subdivision (A) does not use the term "automatic resignation," it defines a period of absence that effectively constitutes this form of resignation. In this respect, subdivision (A), like the statute at issue in *Coleman*, characterizes the factual basis for an automatic resignation.

Section 5.12.030, which has no analogue in the statute addressed in *Coleman*, is not a model of clarity. The first sentence of the section directs the employer, upon determining that an employee has been absent without authorization "for such period of time that it appears likely he intends to resign pursuant to [subdivision A]," to send a notice to the employee stating that failure to return to work "on or before the commencement of the working day stated therein shall constitute *such* resignation." (Italics added.) The second sentence clarifies that the notice should be sent at least one full day "*prior* to the commencement of the working day specified in the notice." (Italics added.) Taken together, the two

sentences direct the employer to send a notice that effectively extends the period of unauthorized absence constituting an automatic resignation: Once the employee has been absent without authorization for the period stated in subdivision (A), the employer is required to send a notice setting a future date by which the employee must return to work.

We turn to the final sentence of section 5.12.030, which states that the employer's failure to give the specified notice does not render "such resignation . . . ineffective." The term "such resignation," on its face, is reasonably construed as referring to the period of unauthorized absence constituting an automatic resignation. Accordingly, the final sentence, viewed in context, provides that if the employer does not send a notice -- and thus fails to extend the period of absence amounting to an automatic resignation -- the three-day period of unauthorized absence defined in subdivision (A) constitutes the employee's automatic resignation. Simply put, the final sentence establishes the period of absence defined in subdivision (A) as the "default" period for the purpose of such a resignation. The rules stated in the first two sentences of section 5.12.030 are therefore properly regarded as "directory," rather than as "mandatory," as they specify conduct for the employer that is ultimately inessential (in the sense described above) for the existence of an automatic resignation.[13]

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[13] "[A] '"directory" or "mandatory" designation . . . denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates.' [Citation.] If the action is invalidated, the requirement will be termed 'mandatory.' If not, it is 'directory' only." (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145, quoting *Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.) Generally, "[t]here is no mechanical test for determining whether a provision should be given 'mandatory' or 'directory' effect. [Citation.] Rather, '"[i]n order to determine whether a particular statutory provision . . . is mandatory or directory, the court, as in all cases of statutory construction and interpretation, must ascertain the legislative intent. In

So understood, section 5.12.030 is not constitutionally infirm. As our Supreme Court clarified in *Coleman*, due process obliges the employer to provide the absent employee with notice and an opportunity to be heard *after* the employer has determined that the employee has, in fact, been absent for the period constituting a resignation: "[B]efore invoking the [automatic resignation] statute, the state necessarily had to determine that the absence was for the statutorily specified period and was without leave. Once the state has made these preliminary determinations, the requirements of written notice to the employee and an opportunity for a prompt response impose little additional burden on the state." (*Coleman*, *supra*, 52 Cal.3d at p. 1122.)

The notice specified in section 5.12.030 is unrelated to the notice requirement of due process. As explained above, section 5.12.030 directs the employer to send a notice to the absent employee (1) to extend the period of unauthorized absence that constitutes an automatic resignation, and (2) to inform the employee about the extended period before it elapses. Under the final sentence of the provision, the employer's failure to send the notice fixes the three-day period defined in subdivision (A) as the operative period. The notice specified in section 5.12.030 is therefore intended solely to adjust the factual basis for an automatic resignation. Nothing in section 5.12.030 -- including the final sentence -- purports to relieve the employer of the duty to provide the employee with notice and an opportunity to challenge the employer's factual determinations *after* the

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the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time. [Citation.] When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose [citation]. . . ."' [Citation.]" (*In re Lamonica H.* (1990) 220 Cal.App.3d 634, 642, italics omitted.)

employer has found that the factual basis for a resignation exists, namely, that the employee has been absent for the pertinent period. (*Coleman, supra*, 52 Cal.3d at p. 1117). Accordingly, because section 5.12.030 is silent about the protections required by due process, it cannot be viewed as constitutionally unsound.[14] (*Coleman,* at p. 1123.)

b. *Official Decision*

Sandoval also contends that there is substantial evidence to support an alternative theory of liability under section 1983, namely, the existence of an "official decision" that violated his due process rights (*Ogborn v. City of Lancaster*, *supra*, 101 Cal.App.4th at p. 463). He argues that DPSS improperly decided not to reinstate him in June 2004, and that liability for this decision attaches to the County under principles of delegation of authority or ratification. The crux of this argument is that the 2003 notices regarding his reinstatement and potential termination were inadequate because DPSS sent them to his parents' Randolph address, and never tried to contact him in any other way.

In *St. Louis v. Praprotnik* (1988) 485 U.S. 112, 122-123, 130 (*Praprotnik*), a plurality of the justices of the United States Supreme Court concluded that section 1983 liability may arise through the conduct of officials with policymaking power. The plurality stated: "[T]he identification of policymaking officials is not a question of federal law, and it is not a question of fact in the usual sense. The States have extremely wide latitude in determining the form that local government takes, and local preferences have led to a profusion of distinct forms. Among the

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14 Aside from the challenge to section 5.12.030, Sandoval does not argue that DPSS has a custom or policy of denying employees subject to automatic resignations the due process procedural protections we have explained, and thus has forfeited any such contention.

many kinds of municipal corporations, political subdivisions, and special districts of all sorts, one may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies." (*Id*. at pp. 124-125.)

The plurality in *Praprotnik* further stated that a municipality may be liable for a subordinate's decision to terminate an employee if the municipality's authorized policymakers have delegated policymaking power regarding the decision to the subordinate, or some official with policymaking power has ratified the subordinate's decision. (*Praprotnik, supra,* 485 U.S. at pp. 123-124, 130.) In *Harman v. City and County of San Francisco* (2006) 136 Cal.App.4th 1279, 1296-1298, the court concluded that section 1983 liability attaches through the delegation of authority only when an official's exercise of delegated authority involves the power to *make policy*: the discretionary power to hire or fire an employee is not, by itself, sufficient for municipal liability, "even though the decision maker may have a final power to make such decisions."

Sandoval contends that the record discloses substantial evidence (1) that the 2003 notices were not sent to his correct address; (2) that the County "operates through [a] delegation of powers"; and (3) that Bryce Yokamiso, DPSS's chief official, ratified the decision to discharge him. In support of items (2) and (3), Sandoval points to testimony from Wendy Besson-Higgins, who testified that her superior, David Miyashita, decided to terminate Sandoval, and that Miyashita received the authority to make this decision from Yokamiso, the Director of DPSS; in addition, Besson-Higgins testified that she "ratified" Miyashita's decision in enforcing it in June 2004, when Sandoval reported for work.

In our view, this evidence is insufficient to establish liability under section 1983 on theories of delegation or ratification. Under California law, the County's

Board of Supervisors is authorized to promulgate rules and policies regarding County employees. (*Marcario v. County of Orange* (2007) 155 Cal.App.4th 397, 406.) Nothing in Besson-Higgins's testimony suggests that the board of supervisors delegated its policymaking authority to Yokamiso (or his subordinates) or itself ratified Sandoval's termination. Nonsuit was therefore proper on Sandoval's due process claim under section 1983.

2. *Instructional Error*

We turn to Sandoval's challenges to the jury instructions. He argues that the trial court, instructing the jury, erred in reading section 5.12.030 in its entirety. As elaborated below, the trial court first provided an instruction based on section 5.12.030 that omitted the reference to the employee's intent found in the provision, and then read section 5.12.030 in its entirety. Sandoval's principal contentions are that section 5.12.030, as read to the jury, was an erroneous statement of law and was otherwise confusing to the jury, and that instructing the jury with section 5.12.030 failed to cure the omission in the prior instruction.[15]

In our view, Sandoval's contentions fail under the doctrine of invited error, which "bars an appellant from attacking a verdict that resulted from a jury instruction given at the appellant's request" by an appeal or new trial motion. (*Stevens v. Owens-Corning Fiberglass Corp.* (1996) 49 Cal.App.4th 1645, 1653-1654.) This doctrine "applies 'with particular force in the area of jury instructions.

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15 Sandoval also suggests that the trial court, in denying his new trial motion, failed to rule on his contention regarding instructional error. We disagree. At the hearing on the new trial motion, when Sandoval noted that the tentative written order (which became the final order) did not expressly address the contention, the trial court responded, "I properly instructed. So I think you need to [argue] on the premise that I believe [the jury] was properly instructed." Code of Civil Procedure section 657, which specifies the form

Whereas in criminal cases a court has strong sua sponte duties to instruct the jury on a wide variety of subjects, a court in a civil case has no parallel responsibilities. A civil litigant must propose complete instructions in accordance with his or her theory of the litigation and a trial court is not "obligated to seek out theories [a party] might have advanced, or to articulate for him that which he has left unspoken." [Citations.]'" (*Id.* at p. 1653, quoting *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.)

Sandoval proposed an instruction on resignation that paraphrased section 5.12.030, but contained no reference to the final sentence of the provision.[16] During the discussion of jury instructions, the trial court stated its preference for an instruction it had prepared that employed language derived directly from sections 5.12.020 and 5.12.030. The following discussion occurred:

"The Court: I just took [the proposed instruction] from the Code. . . . I just took it right out of the -- my feeling is if you want, why don't we just hand [the jury] the whole thing?

"Mr. House [DPSS's counsel]: I had actually suggested that.

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of an order on a new trial motion, requires a written order specifying the grounds for the order only when "the motion is granted."

16 The proposed instruction stated: "Mr. Sandoval resigned his employment following the order of the Civil Service Commission that he be reinstated after release by his doctor and favorable resolution of his worker's compensation claim, if you find that without prior authorization he was absent from work for three consecutive regular working days; provided that (1) it appears from his absence that he intended to resign from his position and (2) Mr. Sandoval's department head served upon him, either personally, by telegraph, or by first class mail addressed to the most recent address furnished to the appointed officer by the affected employee, a notice in writing stating that failure of the employee to resume the discharge of his duties on or before the commencement of the working day state therein shall constitute resignation. [¶] The notice shall be posted, delivered personally, or delivered to the telegraph office at least 24 hours prior to the commencement of the working day specified in the notice."

"The Court: If there's a problem, just give them the whole thing.

"Mr. Ikonte [Sandoval's counsel]: Okay.

"Mr. Akudinobi [Sandoval's counsel]: I rather –

"The Court: I copied it.

"Mr. Akudinobi: *I rather we give them the instruction on the language of 5.030 [sic], which is what the parties agreed upon.*

"Mr. House: But that's what the Court has [done]. . . . [¶]

"Mr. Akudinobi: There's something that is -- [']if it appears likely that [he] intends to resign['] that is missing from that. And I've already argued that to the jurors. And I don't want [them] to have in their mind that I'm mistreating the law intentionally because we agreed on that yesterday.

"Mr. House: This can all be solved by just reading the code sections.

"The Court: *Okay*." (Italics added.)

The parties then moved on to discuss other instructions.

In instructing the jury on resignation, the trial court omitted the portion of section 5.12.030 referring to the employee's apparent intent to resign, but included the final sentence of section 5.12.030.[17] Sandoval's counsel requested a sidebar

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[17] The trial court instructed the jury as follows: "A County employee who without prior authorization is absent or fails to discharge his regularly-assigned duties for either three consecutive regular working days or for two consecutive regularly-scheduled on-duty shifts, whichever may be applicable, shall be deemed to have resigned effective as of the day [on] which he last performed any of the duties of his position provided that the employee's department head shall have served upon that employee, either personally or by telegraph or by first-class mail address[ed] to the most recent address furnished to the appointed official by the affected employee, a notice in writing stating that failure of the employee to resume the discharge of his duties on or before the commencement of the working day stated therein shall constitute such resignation. The notice must be posted, delivered personally, or delivered to the telegraph office at least 24 hours prior to the commencement of the working day specified in the notice. Failure to give written notice shall not cause such resignation to be ineffective."

conference, for which no reporter's transcript has been provided to us. After the conference, the following colloquy occurred in open court:

"The Court: Counsel wanted me to read the *entire section*. And there's a lot of language the way the sections are written. So I'll read it to you. [¶] I assume there's no objection including this one, too?

"Mr. House: That's fine." (Italics added.)

Sandoval's counsel did not respond to the trial court, which then read to the jury section 5.12.030 in its entirety -- including the language regarding the employer's intent and the final sentence. Sandoval raised no objection to the instruction prior to his new trial motion.

The record thus discloses that Sandoval's counsel agreed to an instruction "on the language of section [5.12.030]," and that the trial court later instructed the jury with section 5.12.030 in its entirety, as Sandoval's counsel requested. Sandoval asked for this instruction to cure the omission regarding intent; moreover, in reading section 5.12.030, the trial court merely repeated its final sentence, which the jury had already heard. Accordingly, Sandoval may not contend on appeal that it failed to cure the omission; nor can he complain about the fact that the jury heard the final sentence. (See *Miller v. Kennedy* (1987) 196 Cal.App.3d 141, 146-147.)

Sandoval suggests that he did not invite the error, pointing to the declaration from his counsel, Emmanuel Akudinobi, in support of the new trial motion. We disagree. According to Akudinobi, during the discussion of jury instructions, the trial court refused to give Sandoval's proposed instruction over his counsel's objections, and "opted to read the full text" of section 5.12.030. Akudinobi further stated: "During the instruction[s], the court omitted the intent to resign element

from the instruction while including the surplusage that whether . . . the notification requirement is complied with will not render the deemed resignation ineffective. [¶] [Sandoval's] counsel caught the error by the court and promptly requested the court to reread the instruction to include the intent to resign element. . . . However, in rereading the instruction, the court included the initially omitted intent language, in addition to . . . the surplusage identified earlier."

Upon denying the new trial motion, the trial court stated orally that it had properly instructed the jury. In reviewing the denial of a new trial motion, we imply all findings necessary to support the ruling (*DeWit v. Glazier, supra*, 149 Cal.App.2d at p. 82), and accept the trial court's determinations if supported by substantial evidence (*Enyart v. City of Los Angeles, supra,* 76 Cal.App.4th at p. 507). Under these principles, we infer that the trial court found that it had instructed the jury as requested. Here, Akudinobi's statement that he objected to instructing the jury with section 5.12.030 is contradicted by the record, as is his suggestion that he did not ask the court to read section 5.12.030 in its entirety during the instructions. To the extent that the trial court, in denying the new trial motion, also relied on its recollection of the unrecorded bench conference during the instructions, we will not disturb its implied findings on appeal. (See *Wilson v. Rancho Sespe* (1962) 207 Cal.App.2d 10, 24 [trial court's implied finding that it instructed jury as requested may not be challenged on record that otherwise does not establish error].)

We also conclude that Sandoval's challenges to the instruction fail on their merits. Sandoval's principal contention is that the instruction was an erroneous statement of law because the final sentence of section 5.12.030 is constitutionally unsound. As explained above (see pt. A.1.a., *ante*), this contention is mistaken.

Sandoval also contends that the instruction was deficient in other ways. He argues that instruction was misleading because (1) it contained an unexplained reference to subdivision (A) of section 5.12.030, and (2) its final sentence encouraged the jury to conclude that he could be deemed to have resigned even if DPSS gave him *no* notice in 2003 that he had been reinstated and faced termination for failure to return to work. In addition, he argues (3) that the trial court erred in initially omitting the language regarding intent in section 5.12.030.[18]

In our view, any such error was harmless. Generally, instructional error is prejudicial only if it is "reasonably probable defendant would have obtained a more favorable result in its absence. [Citations.]" (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 570.) "'[P]robability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility. [Citations.]" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics omitted.) In assessing the prejudicial impact of erroneous instructions, we view the evidence in the light most favorable to the party claiming error. (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 223.)

Assuming arguendo that the trial court erred in some or all of the ways Sandoval urges on appeal, it is not reasonably likely that there would have been a different outcome had the jury heard the instruction that Sandoval asserts the trial court improperly rejected during the discussion on instructions.[19] There was considerable evidence that DPSS mailed the 2003 notices "to the most recent

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18 In examining these contentions, we do not address whether Sandoval was entitled to any instructions beyond those he proposed at trial regarding notice of an automatic resignation pursuant to sections 5.12.020 and 5.12.030, as he argues on appeal that the instructions he proposed were constitutionally adequate and sufficient for his theory of the case.

19 See footnote 16, *ante*.

address furnished to [DPSS] by [Sandoval]" (§ 5.12.030), that is, the Randolph address, and that Sandoval never responded to any of the notices, even though he picked up mail at that address throughout 2003. Accordingly, it is likely that the jury would have found that DPSS provided Sandoval with proper notice of his impending termination and ample opportunity to appear for work or explain his absence, even if the purported defects in the resignation instructions had been removed. In sum, Sandoval has failed to establish instructional error.

3. *Special Verdict Form*

Sandoval contends that the special verdict form the trial court provided to the jury was defective. The first question on the form asked the jurors to determine whether Sandoval was "lawfully deemed" to have resigned in October 2003. If they found that he had so resigned, the form directed them to answer no further questions; if they found otherwise, it directed them to answer other questions related to his retaliation and wrongful termination claims. Sandoval argues that his resignation, in isolation, does not shield DPSS from liability for retaliation and wrongful termination, and that the form improperly prevented the jurors from assessing his claims.

This contention fails for want of an adequate objection to the special verdict form before the trial court. A party who fails to object to the special verdict form prior to the discharge of the jury does not preserve his objection on appeal.[20] (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131.) The objecting party must bring the specific defect in the form to the trial court's

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[20] A similar requirement for objections to procedural errors governs new trial motions. (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 21, pp. 602-603.)

attention. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 550-551.)

Here, DPSS and Sandoval each proposed special verdict forms. Sandoval's form directed the jurors to make a complex sequence of interrelated findings regarding his intent to resign, injury from DPSS's conduct and other matters, and it contained at least one item whose meaning was unclear.[21] The reporter's transcripts and minute orders in the record disclose only the following proceedings. On the afternoon of March 13, 2007, during the discussions of the jury instructions and the special verdict forms, the trial court stated: ". . . I have two verdict forms. [DPSS's] form looked a little less confusing. But [Sandoval's form], although, would have been better. Perhaps they could be re-worked so they're not handwritten in." DPSS's counsel answered: "They're on the clerk's computer." Sandoval's counsel did not respond. Later the same afternoon, after instructing the jury, the trial court provided the jury with a revised version of DPSS's verdict form. The minute order from these proceedings states: "Counsel view and approve of all of the following items prior to them being given to the deliberating jury: given jury instructions, special verdict form, and the exhibits."

The record, on its face, contains no objection by Sandoval to the special verdict form adopted by the trial court. Nor did Sandoval preserve his objection by proposing an alternative form that avoided the purported error he urges on appeal. In asking the parties' counsel to consult regarding the forms, the trial court suggested that Sandoval's proposed form was confusing and needed reworking. Although Sandoval was obliged to propose a form that reflected his theory of the case without confusing the jury (see *Jentick v. Pacific Gas & Elec. Co.* (1941) 18

Cal.2d 117, 122; *Mesecher v. County of San Diego*, *supra*, 9 Cal.App.4th at p. 1686), he neither amended his form nor alerted the trial court to the purported deficiency in DPSS's form that he asserts on appeal; on the contrary, the record discloses that his counsel approved the use of DPSS's form.

Sandoval contends that his counsel raised specific objections to the form at an unreported bench conference. To establish the events at this conference, he relies on the evidentiary showing supporting his new trial motion, which asserted the same defects in the special verdict form that Sandoval now raises on appeal. Sandoval submitted a declaration from Akudinobi, who stated that after the jury was instructed on March 13, 2007, he raised objections to DPSS's special verdict form, "which he saw for the first time that day." According to Akudinobi, he identified the defects Sandoval asserts on appeal and asked the trial court to delete the first question, but the trial court declined to do so.

This declaration cannot establish that Sandoval raised adequate objections to the specific verdict form. "A fundamental rule of appellate review is that '"[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown."' [Citations.]" (*Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 841.) To overcome this presumption, appellants must provide an adequate record that demonstrates error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

Akudinobi's declaration is inadequate to carry Sandoval's burden on appeal for two reasons. First, when the trial court denies a new trial motion, we ordinarily resolve conflicts in the evidentiary showings regarding the motion in favor of the

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21 As proposed, Sandoval's form stated: "10. Reinstate JOHN SANDOVAL to Eligibility Worker II without loss of seniority [¶] ___ YES ___ NO." The failure to

denial. (*Enyart v. City of Los Angeles*, *supra*, 76 Cal.App.4th 499, 508, fn. 3; *DeWit v. Glazier*, *supra*, 149 Cal.App.2d at p. 82.) In opposing the new trial motion, DPSS disputed Akudinobi's version of the underlying events. DPSS attorney Ann Wu stated in a declaration that DPSS provided its proposed special verdict form to Akudinobi on March 12, 2007. On March 13, 2007, after the trial court instructed the parties' counsel to meet regarding the special verdict forms, Akudinobi examined DPSS's proposed form and said to DPSS's counsel, "[W]e agree to disagree," but did not identify any specific defects in the form to DPSS's counsel. Shortly thereafter, the trial court took the bench, rejected Sandoval's form as too confusing, and decided to use DPSS's proposed form. According to Wu, Akudinobi raised no objections to the ruling. In denying the new trial motion, the trial court opined only that the special verdict form was not defective. Under these circumstances, we decline to resolve the conflict between Akudinobi's and Wu's declarations in Sandoval's favor.[22]

Second, when the reporter's transcript is unavailable for a bench conference, an appellant's remedies are an agreed statement (Cal. Rules of Court, rule 8.134) or a settled statement (Cal. Rules of Court, rule 8.137).[23] (*Weinstein v. E.F. Hutton & Co.* (1990) 220 Cal.App.3d 364, 368-369.) Sandoval has neither provided such a

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pose this as a question renders the item confusing.

[22] For the same reason, we find no error in the denial of the new trial motion, which may be affirmed on any basis properly supported by the record. (See *Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1; *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15.)

[23] A party may also seek a new trial on the ground that a reporter's transcript crucial to the party's appeal cannot be obtained due to the reporter's death or disability, or the loss or destruction of the reporter's notes. (Code Civ. Proc., § 914.) Sandoval has not asserted this ground for a new trial.

statement nor explained his failure to do so. In sum, Sandoval has failed to establish error in the special verdict form.

B. *Juror Misconduct*

Sandoval contends that he was denied a fair trial due to juror misconduct. He argues that two jurors concealed biases during voir dire, and later disclosed their lack of impartiality in letters to the trial court; in addition, he argues that one of the jurors openly read a newspaper during the presentation of evidence.

"Juror misconduct is one of the specified grounds for granting a new trial. (Code Civ. Proc., § 657, subd. 2.) 'Trial by jury is an inviolate right and shall be secured to all . . . .' (Cal. Const., art. I, § 16.) The right to unbiased and unprejudiced jurors is an '"'inseparable and inalienable part'"' of the right to jury trial. (*People v. Hughes* (1961) 57 Cal.2d 89, 95.)" (*Enyart v. City of Los Angeles*, *supra*, 76 Cal.App.4th at p. 506.) In some instances, inattentiveness may constitute juror misconduct. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411, overruled on other grounds in *Soule v. General Motors, supra*, 8 Cal.4th at p. 574.)

Although the record before us lacks a full reporter's transcript of the voir dire of the jurors and other proceedings, the following facts are apparently undisputed. During voir dire, Akudinobi questioned a prospective juror -- apparently, the juror elsewhere identified as "Juror No. 9" -- who stated that he knew someone who had been fired after his employer learned that he had AIDS, but who did not contest the firing to avoid a "hassle." Akudinobi responded: "That's a non-issue because he made his decision." Later, the trial court invited the prospective jurors to communicate with it by notes if they had concerns regarding their impartiality or ability to serve on the jury.

The next day, after the jury had been selected, Jurors Nos. 7 and 9 submitted notes to the trial court. Juror No. 7 stated that serving on the jury was an extreme financial hardship for him, and asked the trial court to "encourage [Sandoval's counsel] to be more concise in his statements, questions, and arguments." According to Juror No. 9, Akudinobi's remarks about the employee discharged with AIDs had prompted him to feel bias toward Akudinobi. He stated: "Frankly[,] I thought I could manage the bias . . . . [H]owever[,] the more I listen to [Akudinobi] speak in court the angrier I feel and I sincerely believe this antipathy will prevent me from judging this case on its merits." Juror No. 9 also admitted a bias against "African Christians." The trial court passed these notes to Sandoval's counsel.

Later, as Akudinobi was examining Vicky Short, he requested a bench conference. The conference and its immediate upshot are not reflected in the reporter's transcript. However, with the exception of a matter we discuss below, the parties do not dispute that at the conference, Akudinobi informed the trial court that Juror No. 9 was reading a newspaper, and that the trial court directed the jurors not to read during the presentation of evidence.

After the parties completed their closing arguments but before the jury began its deliberations, the trial court excused the jury, with the exception of Juror No. 9. When the trial court asked Juror No. 9 whether he could be fair after hearing all the evidence, Juror No. 9 responded, "I think I can be." After Akudinobi questioned Juror No. 9 about the biases expressed in his note, Juror No. 9 again affirmed his belief that he could be impartial. The conference ended with the following colloquy:

"The Court: Did you want to ask any other questions?

"Mr. Akudinobi: No, your honor."

At no time did Sandoval's counsel ask that Juror No. 9 be excused.

Sandoval's new trial motion argued that Jurors Nos. 7 and 9 improperly concealed biases during voir dire, that the trial court improperly prevented his counsel from examining Juror No. 9 after he submitted his note, and that Juror No. 9 engaged in further misconduct by reading a newspaper. In support of the motion, Akudinobi stated that when he learned about the note from Juror No. 9, he immediately sought to examine Juror No. 9, but the trial court denied his request until after the closing arguments. Akudinobi also stated that after he saw Juror No. 9 reading the newspaper, he asked "that something be done about the juror," but the trial court issued only a general warning to the jury about reading.

DPSS's counsel disputed Akudinobi's version of these events. According to attorney Wu, Akudinobi never raised any challenge to Jurors Nos. 7 and 9 on the ground of bias, even when the trial court decided sua sponte to examine Juror No. 9 after closing arguments. Moreover, Wu stated that when Akudinobi complained that Juror No. 9 was reading a newspaper, the trial court directed Juror No. 9 to put it away. In denying the new trial motion, the trial court found that Sandoval never raised a material challenge to Juror No. 9 until he sought a new trial.

We discern no error. "The rule is well settled that when at any time during trial a party or his counsel becomes aware of facts constituting misconduct or irregularity in the proceedings of the jury, he must promptly bring such matters to the attention of the court, if he desires to object to it, or he will be deemed to have waived the point as a ground for a motion for a new trial." (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 103.)[24] Nothing in the record

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[24] Relying on authorities involving criminal cases, Sandoval contends that the trial court, upon receipt of the notes from Juror Nos. 7 and 9, was obliged to inquire sua sponte into whether they were biased. We disagree. To preserve a contention regarding juror misconduct in civil cases, a party must object to misconduct of which it is aware,

establishes that Sandoval raised an objection to Juror Nos. 7 and 9 on the grounds of bias prior to the verdict. To the extent Sandoval relies on Akudinobi's declaration to fill this gap, we are bound by the trial court's factual determinations, both express and implied. Nor does the newspaper reading by Juror No. 9 constitute a basis for a new trial or a reversal of the judgment, in view of the minor nature of the incident and the trial court's prompt response. (See *Hasson v. Ford Motor Co.*, *supra*, 32 Cal.3d at pp. 414-418 [jurors' inattentiveness is not basis for new trial when record discloses no prejudice].)

C. *Jury Request*

Sandoval contends that the trial court improperly declined to answer the jury's questions after it began its deliberations. We disagree. Code of Civil Procedure section 614 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel." Compliance with these requirements is mandatory. (*Asplund v. Driskell* (1964) 225 Cal.App.2d 705, 712-713.)

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even when the misconduct occurs in open court. (*Jutzi v. County of Los Angeles* (1987) 196 Cal.App.3d 637, 655 [it is the party's obligation to explore juror's purported biases revealed during voir dire]; *Gotsch v. Market Street Ry.* (1928) 89 Cal.App. 477, 484 [party forfeits contention regarding juror's allegedly prejudicial remark to counsel during closing argument by failing to object]; *Doolin v. Omnibus Cable Co.* (1903) 140 Cal. 369, 375 [party forfeits contention regarding juror who directed hostile questions to party's witnesses during trial by failing to object]; see 7 Witkin, Cal. Procedure (5th ed. 2008), Trial, § 376, p. 438.)

Here, the jury sent the trial court a note containing questions regarding the relationship between the hearing officer's November 2002 recommendations regarding Sandoval's discharge and the Commission's January 2003 decision, and other matters. The hearing officer had recommended two alternatives to the Commission: (1) that Sandoval's appeal regarding his discharge be held "in abeyance" until his entitlement of worker's compensation benefits was resolved, or (2) that Sandoval be accorded "conditional reinstatement" predicated upon his entitlement to worker's compensation benefits and his fitness for work. In ruling, the Commission adopted as its "final decision" the hearing officer's recommendation that Sandoval's discharge "not [be] sustain[ed]" and that he be made "whole." The jury's note asserted that the Commission's decision did not identify the recommendation that it had adopted, and asked the following questions: "(1) What is the law regarding [DPSS's] interpretation of [the hearing officer's] recommendations? (2) Was [] DPSS free to interpret [the recommendations] as it saw fit and select which of the two recommendations to follow? (3) Does the term 'conditional reinstatement' mean that an employee can be reinstated to his/her position prior to the resolution of a worker's compensation claim and that his/her continued employment [was] dependent on the claim being eventually resolved?"

After consulting with counsel, the trial court told the jury that its questions posed a "dilemma." The trial court stated that to the extent the jury sought guidance with factual questions, the trial court was "not in the best position to answer [them]"; to the extent the jury sought answers to legal questions, the trial court was largely limited to providing "additional law" within the scope of the instructions unless it "reopen[ed] the case." The trial court suggested that the jury might rephrase its questions in light of "the limitations about giving you new law

in new areas that were never argued or brought forth with the witnesses" and consider whether it wanted fresh argument from counsel on disputed factual issues. It further stated that it would await guidance from the jury as to how it wanted to proceed. The jury sent a note stating that it had no questions, and later returned a verdict.

In our view, the trial court did not err. Although the trial court is obliged to provide additional instructions on "any point of law arising in the cause" (Code Civ. Proc. § 614), the trial court may not "give an instruction which lacks support in the evidence" (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 875). As Witkin explains, "[an] instruction is erroneous if, though abstractedly correct as a statement of law, it is not within the issues developed by the evidence or reasonable inferences from the evidence." (7 Witkin, Cal. Procedure, *supra*, Trial, § 307, at pp. 360-361.) Here, the trial court's remarks properly expressed the concern that the jury's broad questions sought instructions beyond the scope of the evidence presented at trial. The trial court did not refuse the jury's requests, but instead manifested its openness to answering any questions within these limits. (See *Asplund v. Driskell*, *supra*, 225 Cal.App.2d at pp. 712-713 [trial court did not violate Code of Civil Procedure section 614 in asking whether jury could continue its deliberations pending arrival of reporter to read back requested testimony].)

Sandoval's reliance on *Bartosh v. Banning* (1967) 251 Cal.App.2d 378 is misplaced. There, the trial court improperly declined the jury's express request for an additional instruction on a principle of negligence central to the plaintiff's claims. (*Ibid*.) The trial court denied no such request here. In sum, the trial court did not contravene Code of Civil Procedure section 614.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.